FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, *et al.*,
Appellants,

v.

HON. WILLIAM J. USERY, JR.
Secretary of Labor of the United States,
Appellee.

The State of CALIFORNIA,
Appellant,

v.

HON. WILLIAM J. USERY, JR.
Secretary of Labor of the United States
Appellee.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES AND ITS AFFILIATE ORGANIZATION THE NATIONAL ASSOCIATION OF COUNTY CIVIL ATTORNEYS AS AMICUS CURIAE

(Continued)

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STATEMENT OF INTEREST OF THE AMICUS AND IMPORTANCE OF THIS CASE TO COUNTIES: THE UNIQUE ISSUE PRESENTED IN THIS BRIEF

We here present a brief almost solely to one point: that the Fair Labor Standards Act[1] (hereafter the Act and FLSA) is unconstitutional under the necessary and proper clause of the Constitution of the United States. We believe it is the decisive point. We have reviewed the record and the briefs filed herein and no party or *amici* adequately address this point.

The National Association of Counties is composed of political subdivisions of states within Rule 42(4) of this Court and files this brief under said Rule. This brief is signed by their authorized law officers.

Never in 200 years has any Act of the federal Congress so greatly imperiled the fiscal integrity of Counties. This Act imposes new federal law, new federal court preemption of County functions, state law and state court jurisdiction, as well as imposing unique and costly regulations upon Counties. Counties cannot levy taxes, plan budgets, do improvements, fix wages or make any other expenditures of consequence without fear that the FLSA Amendments here attacked as unconstitutional will not, through retroactive application of controls, largely written for private business, hereafter impose costs and criminal penalties the County did not and cannot fix a tax and a budget for, or even pay for.

County integrity is beset with fiscal problems even now. If this uncertain Act is upheld, it should be accompanied by a decision of this Court that there be an immediate federal appropriation paying its millions in

[1] c.676, 52 Stat. 1060, 29 U.S.C. §201 *et seq.* (1970), *as amended.*

costs. Counties do not and cannot get the tax money to pay for the Act's requirements, and unnecessary expenditures of millions in useless costs can only result in cutting County services, by cutting personnel off the County payrolls.

The burden is on the government to produce evidence of a finding by the Congress of major impact on commerce by County wage payments in order to validate the Act. We cannot find any substantial finding that Congress actually made a finding that its application to County employees would promote some congressional policy objective with regard to interstate commerce. One looks in vain for indications that Congress made any such finding. The discussion and debate recorded in the Congressional Record concerning the bill, contain minuscule references to an unidentified 95,000 out of 11,400,000 state and local employees who may have then been paid below the minimum wage. Appellants' briefs challenge this claim, but even if true this is a mighty thin basis for such a major shift to the federal government of power over 85% of the budgets of Counties. We do not even know whether they are County employees. Are these unidentified 95,000 so placed that they can block or stop or affect commerce substantially? One is led to doubt such a conclusion.

We, therefore, urge that this presentation on this question of great public importance which goes to the very future existence of Counties as meaningful government bodies be given consideration by this Court. This Court is here deciding whether there is to be a future for Counties in our nation or whether the national Labor Department and the federal courts are going to take them over and run them. On the subject of control, surely all must concede that ultimate federal control of

85% of each County's budget is control of that County.

If this Court holds that the federal government can order states, cities and Counties to spend their people's tax money to carry out the federal purposes of this Act—purposes we cannot fathom and which are of no benefit and great damage to Counties—your decision will control and will be obeyed. We believe, however, that this Court should be advised that obedience will either cause increased taxes or cut out County jobs and services. The Clean Air Amendments of 1970, 42 U.S.C. § 1957(h) have recently been seriously questioned on constitutional grounds because they force states and Counties to pay out state and County tax money for a federal requirement. See *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975); *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975); *Maryland v. EPA*, 8 E.R.C. 1105 (4th Cir. Sept. 1, 1975); *District of Columbia v. Train* ____ U.S. App. D.C. ____, ____ F.2d ____ (Oct. 28, 1975).

On top of its enormous cost, and adding to that cost enormously is the fact that, under this Act, federal officials, federal administrative judges and the federal courts replace state officials and courts. It is awkward and costly for Counties to deal with these federal agencies and the federal courts on matters totally local in character and which up to now have been handled reasonably and satisfactorily to all concerned: *i.e.* Counties, their residents and their employees.

SUMMARY OF ARGUMENT

A proper analysis of the necessary and proper clause as the congressional power supporting the 1974 Labor Act Amendments as applied to states and cities, has not been ~~been~~ made in this case. Certainly it was not made by the Congress, which is required to justify these Amendments substantially, and cannot rely on this Court to surmise a basis for them.

Under the necessary and proper clause, the Congress was required to show that working conditions among state and local government employees are so bad as to present the substantial possibility of strikes drastically interrupting the flow of goods and services in interstate commerce; Congress further was required to show that the Amendments would diminish the labor unrest and therefore protect and promote commerce. This is the basis for the original 1938 Labor Act and quite permissible a showing under the necessary and proper clause (Other bases, such as Congress' desire to eliminate competition in the sale of goods and services *in interstate markets*, coupled with a finding that substandard wages is an unfair competitive device, cannot, by the very nature of government, be here applicable).

Rather than such a telic showing, the Congress here cites purchases of goods by states and cities, the welfare system and a *pot pourri* of factors which do not in any way support these Labor Act Amendments.

Of the required showing of state and local government employees who strike over wages which the Act will improve, the Congress mentions the existence of 95,000 out of 11,400,000 employees and does not show that any of them strike. Considering the federalism interest involved in this case, this is a scandalously weak showing. No case of this Court will support upholding the 1974 Amendments on such a weak reed.

ARGUMENT

I.

THE NECESSARY AND PROPER CLAUSE ISSUES HAVE NOT BEEN PRESENTED IN THIS CASE.

At the outset, it is essential to distinguish clearly between issues under the commerce clause, on the one hand, and issues under the necessary and proper clause of the Constitution on the other hand. There is a great tendency among lawyers, and in the cases, to speak imprecisely and to confuse these distinct issues. For example, it is commonplace to speak of the commerce power reaching activities that "affect" interstate commerce. Loose talk about activities that "affect commerce" is responsible for a great deal of confusion and sloppy analysis of federalism issues. In reality, *there is no commerce clause principle that empowers Congress to regulate non-interstate commerce activities because they affect interstate commerce.* Statements suggesting that there is such a principle (and such statements abound) are imprecise and sloppy misstatements of a *different* principle, based upon a *different* clause, and *not* based on the commerce clause at all.

> The *commerce clause* does *not* empower Congress to regulate non-interstate commerce activities which affect interstate commerce.
>
> The *necessary and proper clause*, however, frequently does.

To be sure, even the courts themselves have frequently failed to be precise in expression, and have

written in commerce clause language at times when the question at hand, correctly stated, was a necessary and proper clause question. The cases are full of careless shorthand statements that Congress can regulate this or that intrastate activity "under the commerce clause," because of its effect on interstate commerce.[2] If the importance of greater precision of expression were perceived, those statements would instead have indicated that Congress could regulate the intrastate activity in question under the necessary and proper clause, because of the relationship between that intrastate activity and some desired interstate commerce policy objective. In fact, at times the importance of greater precision of expression *has* been perceived, and when it has been, this Court has taken care to separate the commerce clause and necessary and proper clause issues. Illustrative cases are cited on page 41 of Engdahl, *Constitutional Power: Federal and State In A Nutshell* (1974).

In the case now at bar, the bulk of the state employees to whom the new provisions apply are not engaged in interstate commerce. Neither were the state and local school and hospital employees who were involved in *Maryland v. Wirtz*, 392 U.S. 183. Neither was the "loan shark" who was involved in *Perez v. United States*, 402 U.S. 146. The loan shark's business activity could be reached by Congress, however, because the elimination of that local activity was viewed as a means to effectuate the congressional policy objective of unencumbered inter-

[2] Because the necessary and proper clause requires another power as its object, and is thus always auxiliary to another power, it is not entirely inaccurate to say that a measure sustained by the necessary and proper clause with reference to the commerce clause is valid under the latter. In *Wirtz*, for example, Justice Harlan wrote, "This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis [a necessary and proper clause test] for regarding them [in their effect] as regulations of commerce among the States." 392 U.S. 183, 192.

state commerce. Although Mr. Justice Douglas in the *Perez* majority opinion called this an exercise of the commerce power, it was in reality an exercise of the necessary and proper power. Similarly, in *Maryland v. Wirtz, supra,* the state and local school and hospital employees could be reached because the regulation of them in the way provided for by Congress was a means to a commerce clause end–a necessary and proper method for producing the uninterrupted flow of goods across state lines. *Wirtz,* both as to the state activities issue and as to the enterprise concept as such, turned not on the commerce clause, but rather on the necessary and proper clause. Similarly, in the case at bar, in spite of the obvious fact that the activities of the state and local employees are not themselves interstate commerce these employees could still be reached if the requirements, not of the commerce clause, but rather of the necessary and proper clause, were met.

This case, just like *Maryland v. Wirtz, supra,* is fundamentally a necessary and proper clause case, *not* a commerce clause case. Recognizing that fact is extremely important, because without that distinction firmly in mind one too easily will keep slipping back into fruitless political grumblings about "the expanding commerce power" and the "death of federalism," and may fail to perceive with sufficient clarity the crucial practical and enforcible necessary and proper clause principles that govern this case.

II.

THE KEY TO THIS CASE IS THE NECESSARY AND PROPER CLAUSE, NOT THE COMMERCE CLAUSE.

The key to this case is the necessary and proper clause and the principles–some of them well-established and some of them only now emerging–which the decisions of this Court support in relation to that clause. See Engdahl, *supra* at §§ 2.01-2.03 where the classic misconceptions concerning the meaning and operation of this clause are explained.

Having clarified the misconceptions, let us look at some enforcible and very practical limits on the necessary and proper power, which are well supported by the cases, have not been damaged by *Wirtz* or other cases, and rather clearly have been transgressed by the legislation now challenged.

The enforcible limits which are relevant are three. In order to uphold the application of FLSA provisions to state and local government employees (not engaged in interstate commerce) as an exercise of the necessary and proper clause power, this Court must find that:

> (a) Congress has found that the application of FLSA to such employees will promote some policy objective that Congress has with regard to interstate commerce (as distinguished, *e.g.*, from a policy objective with regard to standard of living);
>
> (b) The congressional finding that the regulation will promote such interstate commerce policy objective, is a finding that has a rational basis; and
>
> (c) The impact which Congress has rationally found that the FLSA coverage of state and local employees will have upon that interstate commerce policy objective, is a "substantial" impact.

III.

TO SATISFY THE NECESSARY AND PROPER CLAUSE, THE COURT MUST FIND THAT CONGRESS HAS FOUND THAT THE APPLICATION OF FLSA TO STATE AND LOCAL GOVERNMENT EMPLOYEES WILL PROMOTE SOME CONGRESSIONAL POLICY OBJECTIVE WITH REGARD TO INTERSTATE COMMERCE.

It used to be, earlier in this century, that the Court, instead of leaving this determination to be made by Congress, would take it upon itself to determine whether a regulation of some non-interstate commerce matter by Congress would promote some interstate commerce policy objective and thus be valid under the necessary and proper clause. An illustration is *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330; another is *Adair v. United States*, 208 U.S. 161, 176-179. Those cases were aberrations, however, from the main-line of decisions, continuing to the present without any prospect of change, which hold that this determination is for Congress to make, *e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, at 423; *Stafford v. Wallace*, 258 U.S. 495, at 521; *Chicago Board of Trade v. Olsen*, 262 U.S. 1; *Katzenbach v. McClung*, 379 U.S. 294.

But while the determination that the regulation of the non-interstate commerce activity (*i.e.*, application of FLSA to state and local government employees) will promote a commerce policy objective is a determination for Congress and not for the Court to make, it is necessary for this Court, in ruling on the validity of the measure, to ascertain whether or not Congress *has* made that determination. Now, there is no requirement that Congress express its finding on this crucial point in any

particular way. Sometimes the finding is articulated in a preamble or in the text of an act. Sometimes it is expressed in the text of significant committee reports. Sometimes the finding is inferred from other materials of legislative history, or from the bulk of hearing testimony or other information known by the Court to have been before the Congress, and reasonably assumed to have influenced Congress' judgment on the point. As the Court said in *Maryland v. Wirtz*, the Court does not need to be "concerned with the manner in which Congress reached its factual conclusions" about whether the regulation would promote an interstate commerce policy end. 392 U.S. at 190 n. 13. Neither does the Court have to be concerned about just how Congress expresses those conclusions once it reaches them. However, it is essential that this Court be able to ascertain somehow, from some sufficient indication, that Congress actually has reached the conclusion that the regulation will promote the commerce policy objective.

In case after case after case, where the validity of federal enactments has turned on the necessary and proper clause, this Court has gone to considerable lengths to recite indications from the legislative history or from the language of the act to show that Congress actually did find that the regulation of the local activity in question would promote some congressionally desired commerce policy objective. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 308-15; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246, 252-53, 265-66; *Katzenbach v. McClung*, 379 U.S. 294, 299-301; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 n. 8; *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 11-15, 37-38; *Stafford v. Wallace*, 258 U.S. 495, 499-502; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402, 423-24.

Much of the cynical discussion about federal power among lawyers (and particularly among "sophisticated" constitutional law professors) today proceeds in ignorance of the significance of this requirement that *Congress have found* the required relationship between its regulation of a local activity and the promotion of its interstate commerce policy objective, in order for the regulation to be upheld under the necessary and proper clause. Men and women of imagination could put together a string of means-to-end connections sufficient to tie almost any and every conceivable local activity to some hypothesized objective within the scope of the federal power over interstate commerce. But the entertaining imaginings of cynics about the bankruptcy of commerce clause doctrine, are not the kind of inquiries that Supreme Court Justices make when they consider a necessary and proper clause issue. The issue is not, "*can we imagine* that this regulation might promote a commerce policy objective," but rather, "*did Congress find* that it does."

There has not been a modern case yet decided in which, after inquiry, this Court has been unable to discover such a congressional finding where it was required. Consequently, we do not have in the cases an explicit holding that the failure of Congress to find the necessary means-to-end relation to exist will result in the invalidation of its regulation of the local activity under the necessary and proper clause. However, there are strong arguments that such invalidation would have to result if the necessary congressional finding were not found. And, as will be explained, it may well be that the case now at bar will be the first in which this Court will be unable to say that Congress made the finding required.

A. Congress Has Not Found That Application of The FLSA To Counties Will Promote A Congressional Policy Toward Commerce.

The arguments for invalidity—where Congress has not made the necessary finding are as follows:

First, the cases cited above, in which the Court has elaborately recited the findings of Congress, contrast sharply with cases like *McGowan v. Maryland*, 366 U.S. 420; *Williamson v. Lee Optical Co.*, 348 U.S. 483; and *Railway Express Agency v. New York*, 366 U.S. 106, which involve a comparable means-to-end test for upholding state regulations of economic interests under the Fourteenth Amendment. In those Fourteenth Amendment cases, the Court has not required actual findings by the legislatures that the acts being challenged promote some legitimate state end; instead, the Court has indulged in speculation and surmise to discover some conceivable such redeeming relation. This contrast, arguably, reflects the judgment that expansion of federal power is a greater risk to our traditions of limited government and enumerated powers than exertion of state power, and is thus to be reviewed much more critically by the Courts.

Second, for this Court to speculate so in the necessary and proper clause context, rather than insisting that a finding have been made by Congress, would be for the Court to take unto itself the function of determining whether the requisite relationship exists; and that would be to revert to the discredited approach of *Alton Railroad* and *Adair, supra*, in violation of the cases like *McClung, Chicago Board of Trade, Stafford*, and *McCulloch, supra*, which hold that this is a function for Congress.

Third, given the doctrine of enumerated powers, and the emphasis which the admittedly truistic and tautological Tenth Amendment gives to that doctrine, it would be quite anomalous to uphold federal regulation of a strictly local activity on the basis of the necessary and proper clause without some kind of showing, from some probative indications in the language or history of the legislation, that a finding that the regulation would conduce to some enumerated power objective was actually made. Where a sufficient relation to a commerce clause objective is shown, federal power can extend deep into what otherwise would be the states' own policy domain, with preemptive effect. This Court has always been cautious about approving such alterations in the balance of federalism. In a comparable situation recently the Court said:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . [T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

United States v. Bass, 404 U.S. 336, at 349. *See also Younger v. Harris*, 401 U.S. 37.

Fourth, requiring that Congress confront the issue and actually make a finding that the particular regulation being imposed on some local activity promotes some interstate commerce policy (whether or not that finding is anywhere explicitly articulated in print), is necessary in order to assure that the deliberative political process is made to work. Ultimately, most constitutional doctrines operate not as absolute and insurmountable barriers to a course of action, but rather as buffers to slow down precipitous action, to require contravening considerations

to be weighed, to provide points of contest to focus political debate, and generally to put the deliberative process of a healthy democracy through its paces. Lots of congressmen might agree that state and local employees should have shorter work weeks and better pay. Propose that this ideal be achieved through federal rather than state legislation, and the support probably will dwindle a bit. Propose that the standards be the same as for private industry, and the support may fall off a bit more. Explain that the regulation is needed in order to prevent strikes by disgruntled public employees, and you may win back a few supporters who don't like strikes, but lose a few who believe the risk of such strikes is minor or can be otherwise handled. Add the requirement that Congress must find that such strikes, should they occur, would disrupt interstate commerce, and you may pick up a few guardians of industry, but lose a few others who just aren't convinced by the evidence that such disruption would occur. Requiring some indication that Congress has considered the matter and made the required finding gives some assurance that this process of discussion and deliberation has occurred. Failing to enforce such a requirement, on the other hand, short-circuits the process and heightens the chances that discussion will go little beyond the political desirability of shorter hours and better pay. The reports quoted by appellants in their briefs clearly prove that Congress was somewhat deceived and misled by misrepresentations as to the impact of the new provisions upon state and local governments and underscore the desirability of insuring full deliberation.

We therefore urge that the amendments applying FLSA to state and local government employees transgress this first enforcible limit of the necessary and proper clause.

IV.

THE BURDEN IS ON THE GOVERNMENT TO VALIDATE THE ACT BY PRODUCING EVIDENCE THAT WAGE PAYMENTS TO COUNTY EMPLOYEES (BE THEY THE UNKNOWN 95,000 OR THE 12 MILLION TOTAL STATE AND LOCAL) ADVERSELY IMPACT COMMERCE.

The House Report, H. Rep. No. 913, 93d Cong., 2d Sess. (1974) contains no discussion whatsoever of the impact on County employees, or even on state and local employees as to coverage under interstate commerce. It does, however, refer to a 1970 study of the feasibility of covering state and local employees, which was submitted to Congress by the Department of Labor. The famous 95,000 unidentified state and local employees out of 11,400,000 paid below the minimum wage are mentioned there. It is absurd that Congress would focus on these nameless 95,000 when there are literally millions of exempt employees in over 50 broad categories of exemptions under the Act. (See attached Appendix). A most interesting exemption is that of Act § 7(f) excusing violations of the Act made under collectively bargained contracts, thus forcing unionization on entities which would retain flexible scheduling practices. The most interesting exemption from the entire Act is § 3(d)'s exclusion of labor unions and their officers and agents. That study does not contain anything from which Congress might have concluded that by thus extending coverage of the Act, it would promote some commerce policy end. In fact the Appellants' brief at pages 19-21 quotes the Statement of the then Secretary of Labor, opposing the Act's Amendments as an undue and unnecessary intrusion upon state sovereignty.

The House Conference Report, H. Conf. Rep. No. 953, 93d Cong., 2d Sess. (1974), contains no reference at all to the entire matter of County or of state and local government employee coverage. The Senate Report, S. Rep. No. 690, 93d Cong., 2d Sess. (1974), is interesting. At page 24 of the Senate Report appears the following paragraph:

> "The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well."

However, first, § 3(i) exempts "ultimate consumers" from the Act. Second, this is simply not adequate as a finding to satisfy the requirement under the necessary and proper clause. What is required is not a finding that the activity being regulated affects interstate commerce, but rather a finding that the particular regulation being imposed on that activity will promote some particular objective that Congress has set for itself with regard to interstate commerce. *See* Engdahl, *Constitutional Power, supra*, § 5.04.

In contrast to the statements above quoted from the Senate Report, it might be helpful to indicate what might have been a sufficient congressional finding (if it had been made). It might have been found that working conditions among state and local government employees are so bad on such a widespread national scale that the

employees are restless and might strike in such large numbers that the flow of goods and services interstate would be drastically interrupted, and that by federal regulation of state and local employees, the new federal working conditions would diminish the unrest and thus promote Congress' objective of having interstate commerce proceed without interruption. Or, it might be found that cut-rate wage conditions in state and local government employment create market conditions making for a kind of competition for goods and services in the interstate market that Congress has decided it wants to eliminate from interstate commerce. If these sound familiar it is of course true that those are the kind of findings that *were* made by Congress to base the original FLSA upon the necessary and proper clause as to private business. But there are no congressional findings like this to lend support to the extension of coverage to state and local government employees under the Amendments here attacked.

The dim references to some 95,000 out of nearly 12 million state and local employees with no identification as to who and where these employees are is a paltry basis for such a huge shift of government power. The challengers of the Act in *Maryland v. Wirtz* made a major point of the claim that there were not sufficient findings made by Congress to support the 1961 "enterprise concept" amendment of the FLSA under the necessary and proper clause. The point did not seem to impress the majority, for a footnote says:

> "The original Act stated Congress' findings and purposes as of 1938. Subsequent extensions of coverage were *presumably* based on similar findings and purposes with respect to areas newly covered." 392 U.S. 183, 190 n. 13 (emphasis added).

That may be an indulgent presumption, although it is a far more reasonable presumption with regard to

extension of a comprehensive, long continued, and continually reviewed regulation of commercial enterprise than it would be in the case of a wholly new enactment or a radically new departure in regulation. What is notable, however, is that this "presumption" when indulged in 392 U.S. 183, 190 n. 13, pertained to the "enterprise concept" amendment, and no such presumption was indulged when the Court came to that part of the opinion dealing with extension to cover maintenance employees of public schools and hospitals, while noting the enormous elimination of thousands of highly paid professionals. Instead, the Court in its footnote 25 (392 U.S. at 195) referred to a Labor Department study, said to be available to Congress in 1960 concerning work stoppages involving government employees, which the Court said documents work stoppages (and consequent disruptions of the interstate flow of goods and services) in public schools and hospitals.

V.

TO SATISFY THE NECESSARY AND PROPER CLAUSE THE COURT MUST FIND THAT THE FINDING THAT CONGRESS HAS MADE CONCERNING THE PROMOTION OF AN INTERSTATE COMMERCE PURPOSE IS A FINDING THAT HAS A RATIONAL BASIS.

The District Court's finding that little or no interstate commerce competition is created by states and local governments, even less than in *Wirtz*, caused that Court to wonder whether this Supreme Court would interpret *Wirtz* so broadly as applied in this Act to encompass the whole of state and local government and the hundreds of their non-commerce services not affecting commerce.

A. What does rational basis mean?

First, it is to be noticed that the requirement is *not* that there be some rational basis for doing what the Act does, or for regulating what the Act regulates. To ask whether it is "rational" for the federal government to regulate the acts of states in fixing employees' wages, or whether there is a "rational basis" for doing so, is no different from what the courts did some fifty years ago under the guise of "substantive due process," arrogating to themselves the power to declare that one or another substantive policy chosen by the legislature was "unreasonable" and therefore void. That old *Lochner v. New York*, 198 U.S. 45, doctrine went out long ago with *Nebbia v. New York*, 291 U.S. 502, and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379. The "rational basis" test has nothing to do with that. We do not believe this Court is about to get back into the business of declaring legislative policy choices "irrational" again.

Rather, the "rational basis" requirement relates to Congress' *finding* of a *relationship*, the relationship between a particular regulation of some local activity, and the attainment of some interstate commerce policy objective, eradicating some evil affecting or impeding commerce.

Strictly speaking, the rational basis question arises only after it is determined that Congress has in fact found such a relationship to exist. However, we presume to cast the question in terms of whether there is any rational basis on which Congress did find, or could have found, that the regulation in question, although a regulation of a local activity and not a regulation of something in interstate commerce, promotes a congressional policy objective with regard to interstate commerce.

"Rational basis" is unquestionably a lower standard than "preponderance of the evidence," or even than "substantial evidence." On the other hand, one can certainly with reason contend that it is more than a "scintilla" rule. At least it must mean consistency with the expectations of probability gleaned from common experience, and it may well carry a connotation of some significant creditable evidence.

It is an easy error, but a serious and demonstrable error, to mistake the requirement of a "rational basis" for no effective requirement at all. *It is true that there has not been a case since 1937 in which a majority of the Supreme Court, in applying the necessary and proper clause to commercial regulations, has held a federal statute to fail the rational basis test.*

Has the Court abdicated the rational basis test for commerce clause legislation? If we believed that, we would not file this brief! However, there are matters *other* than commerce to which the necessary and proper clause applies. Furthermore, there are issues other than those under the necessary and proper clause as to which controlling effect will be given to a legislative judgment only if it has a "rational basis." This Court's reasoning on these other issues gives some insight into the notion of "rational basis," which can be generalized and applied here. In some cases, legislation *has been* invalidated because the legislative findings on the issue crucial to its validity have failed to pass the rational basis test. *E.g.*, *United States ex rel. Toth v. Quarles*, 350 U.S. 11; *Morey v. Doud*, 354 U.S. 457. In addition, the opinions of the several Justices in other cases contain passages that help to clarify what meaningful limits the rational basis concept entails.

One such opinion is found in *Quarles, supra,* a case in which the Supreme Court invalidated a statute which provided that an ex-serviceman could be tried by court-martial for an act allegedly committed during his term of military service. The dissent in that case detailed the reasoning by which Congress had apparently concluded that the statute was necessary and proper to the enumerated power of controlling the armed forces, 350 U.S. at 27-29; but the majority swept that reasoning aside, saying that "[i]t is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed" in the absence of the regulations. 350 U.S. at 22.

Another such case is *Morey v. Doud, supra,* which, unlike *Quarles,* cannot be avoided with the assertion that something more stringent than a "rational basis" test was in fact being applied because favored rights were involved. In *Doud* the Court applied a rational basis test to a state scheme of commerce regulation, and held the scheme invalid for lack of any rational basis on which a means-to-end relationship to any governmental interest could be found.

Another illustration is provided by the companion cases of *Perez v. Brownell*, 356 U.S. 44, and *Trop v. Dulles*, 356 U.S. 86. In *Perez* this Court upheld one application of the Nationality Act of 1940, while in *Trop* it found another application of the same Act unconstitutional. Some of the Justices maintained in both cases that involuntary divestiture of American citizenship was in all events a violation of a specific constitutional guaranty, *i.e.*, Mr. Chief Justice Warren, and Mr. Justice Black, and Mr. Justice Douglas. A majority of the Court disagreed with that thesis, but conceded that such divestiture could be sustained under the necessary and proper clause only

if rationally found to be a means of effectuating some federal government power. Several of the Justices found and articulated what to them seemed a sufficiently rational basis in both cases: *see* 356 U.S. at 60-62, and 356 U.S. 121-22 (Justices Frankfurter, Burton, Clark, and Harlan). The only member of the Court to vote with the majority in both cases was Mr. Justice Brennan. He agreed that the presence or absence of a rational basis for finding a means-to-end relation was decisive in both cases, and he explained at some length why he found that requirement to have been satisfied in the one case but not in the other, 356 U.S. at 105-14.

There are more illustrations, too. Justice Harlan discussed the rational basis requirement in connection with various applications of one particular federal law, in his opinion concurring in part and dissenting in part in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 257-58. Three years earlier, in *Reid v. Covert,* 354 U.S. 1, Mr. Justice Harlan and Mr. Justice Frankfurter had disagreed over whether the rational basis test was satisfied by another regulation under the necessary and proper clause: *cf.* 354 U.S. at 71-73, 77-78 (Harlan, J., concurring) *with* 354 U.S. at 46-47 (Frankfurter, J., concurring).

Another kind of case also gives some insight into the meaning of "rational basis." Occasionally, when confronted with a federal statute that appears very difficult, if at all possible, to justify on necessary and proper clause grounds, the Supreme Court has escaped the onus of invalidating the act by instead giving it an artificially narrowed construction. *E.g., United States v. Five Gambling Devices,* 346 U.S. 441, at 447-49, 452; *Tot v. United States,* 319 U.S. 463, at 467-68, 472. Such artificial construction gives rise to the strong suspicion

that the act would have been held to lack a rationally based means-to-end relationship to sustain it under the necessary and proper clause if it had been more candidly construed.

Neglect of these opinions, which illustrate the real force that the rational basis test can have, has led many lawyers to become cynical and careless about the concept of rational basis. There have been instances in which statutes straining the limits of constitutional power have been allowed to go by without challenge, even though it seems very likely that a challenge on the rational basis ground, had it been made, would have been successful. *E.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542.

Maryland v. Wirtz itself implies a "some significant creditable evidence" and "common experience" concept of rational basis. There the Court said, in the text accompanying footnote 25:

> "Strikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent [citing the Labor Department study for evidence], obviously [based on the expectations of probability gleaned from common experience] interrupt and burden this flow of goods across state lines [contrary to Congress' free-flow commerce policy]. It is therefore clear that a 'rational basis' exists. . . ."

Now, surely it is not difficult to distinguish, in terms of available evidence and common experience, between labor conditions in public schools and hospitals, on the one hand, and the entire non-supervisory state and local government workforces, who render an estimated 500 separate public services on the other hand, with respect to their relationship to the flow of goods between states. If there is any evidence or experience to lend color of

rationality to a finding that wholesale federal regulation of state and local government employees services thus controlling their wages and hours will promote the free flow of goods across state lines, or eliminate some undesirable kind of evil competition in interstate commerce, that evidence and experience has been concealed quite as well as the congressional finding itself.

VI.

TO SATISFY THE NECESSARY AND PROPER CLAUSE, THE COURT MUST FIND THAT THE IMPACT THAT THE FLSA COVERAGE OF STATE AND LOCAL EMPLOYEES WILL HAVE UPON THE INTERSTATE COMMERCE POLICY OBJECTIVE IS A "SUBSTANTIAL" IMPACT.

We hope to avoid the revival of any form of "direct" effect requirement! That would be to return a great stride toward the discredited old rule of *Schechter Poultry Corp. v. United States*, 295 U.S. 495 and *Carter v. Carter Coal Co.*, 298 U.S. 238, which we escaped none too soon in 1937 when *NLRB v. Jones & Laughlin*, 301 U.S. 1, and a few years later *United States v. Darby*, 312 U.S. 100, brought us back to the historic old rule of *McCulloch v. Maryland, supra.* However, *Jones & Laughlin*, 301 U.S. 1, at 37, and also *United States v. Darby*, 312 U.S. 100, at 119-120, do declare that in order to satisfy the necessary and proper clause the relationship between the particular regulation of the local activity and the interstate commerce objective that it purportedly promotes must be "substantial." Of course, "substantial" is not a litmus paper criterion; but it is not a meaningless or insignificant requirement, in spite of the fact that no

modern case (at least until this one) can be pointed to in which even a district court has found the relationship to a commerce objective to be "insubstantial." Here the District Court did so find as a fact. While admittedly repetitious, we must refer again to the fact that Mr. Justice Harlan was indeed very much aware that the power of Congress does have limits. He wrote in footnote 27:

> "Neither here [in *Wirtz*] nor in *Wickard* [*v. Filburn*] has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state . . . activities."

Then he repeated the requirement of "substantial relation." Since that time, at least one of the Justices of this Court has cited a failure to meet the "substantiality" requirement, to his satisfaction, as a reason why he would invalidate an enactment even though it met the other requirements of the necessary and proper clause. *Perez v. United States*, 402 U.S. 146, 157 (Stewart, J., dissenting).

The Court's willingness to infer from the availability of that data that Congress did make such a finding does indicate that Congress *did* make the relevant finding. There is nothing even comparable to that to indicate that Congress made any finding sufficient to sustain under the necessary and proper clause the latest amendments, now being challenged.

If there were any indication that such a finding had been made, then the next question would be whether the finding had a rational basis. If no sufficient finding were made, however, the rational basis question should not even be reached. The provisions being challenged are invalid because they do not even satisfy the first requisite of the necessary and proper clause: Congress did not find

that the application of FLSA to state and local government employees would promote any congressional interstate commerce policy objective of any kind at any time.

Yet, we repeat the claim of impact here is on 95,000 out of 11,400,000 and to this day the 95,000 remain unidentified, unlocated, and the impact on them is unknown. It is reasonable to conclude their slight impact is so insubstantial as to raise the question: How could there possibly be a rational basis for Congress to reach out and embody the whole of state and local governments under this Act?

Even if the Court were to find that Congress in its nebulous, unclear report has found that this extension of FLSA coverage will promote free flow of goods or prevent some undesirable kind of competition in interstate commerce due to unidentified low paid state or local employees and even if the Court finds that there is a sufficient rational basis to support that congressional finding of relationship, still the impact that the wages and hours of policemen, firemen, and other state and local government employees as a whole might have on such flow of goods or competition is certainly not "demonstrably substantial," as Justice Stewart would have required in *Perez*. When that relatively insubstantial impact is compared with the enormous effects already shown in the brief of Appellants which the Act will have upon state and local governments, we have the perfect instance of what footnote 27 in *Wirtz* referred to as the use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state . . . activities." Remember, what is important is not whether the activities of state and local governments have a substantial or trivial impact on interstate commerce, but rather, whether the regulation of these government employees' wages and

hours will have a substantial or trivial impact upon disruptions of, or undesirable competition in, interstate commerce.

Mr. Justice Harlan was absolutely right: Not in *Wirtz*, nor in any other case, has the Supreme Court ever countenanced any such thing.

VII.

THE INTERGOVERNMENTAL IMMUNITIES ISSUE

The distinction here is between regulation of the state when it does the same sorts of things that private persons may do, on the one hand, and regulation of the state when it does those things that are unique to states and are inherent in being a government, on the other hand. A recent case making this point is *Bradley v. Saxbe*, 388 F. Supp. 53 (D.D.C. 1974), (appeal noted but withdrawn). In *Maryland v. Wirtz*, the Court pointed out that there was nothing uniquely state or sovereign about running a school or a hospital. These are functions that private entities perform, too. It is not that they are "proprietary" rather than "governmental." Rather, it is that those activities are not, to adopt Mr. Justice Frankfurter's phrase in *New York v. United States*, 326 U.S. 572, "uniquely capable of being performed only by a state." In contrast, many of the activities performed by employees reached under the new FLSA amendments *are* "uniquely capable of being performed only by a state."

All the Court held in *Wirtz* was that "If a state is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private

persons, the State too may be forced to conform its activities to federal regulation," 393 U.S. at 197. And the Court simply refused to "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens."

The new extension of the FLSA to cover all non-supervisory state and local government employees, including those in state activities that have no counterpart in the private business world, has no support in the *Wirtz* opinion, and in fact is quite inconsistent not only with the Court's language in that case but also with the reasoning of the earlier cases. Mr. Justice Harlan understood perfectly well what he was writing for the Court; and he would have ruled in favor of the states, cities and Counties in the case at bar on the basis of the language quoted. There is no other reasonable interpretation of his words.

CONCLUSION

In enacting Pub. L. No. 93-256 Congress did not meet its burden under the necessary and proper clause of demonstrating how the regulation of state, County and city government wages, hours and working conditions would substantially promote a congressional policy objective with regard to interstate commerce. The "findings" which Congress arrived at do not carry this burden and lack any rational basis. Appellee has been unable to meet and carry this burden in this case. Therefore, since the Act does not meet the Constitutional criteria under the necessary and proper clause, it must be declared unconstitutional. As the Congress' burden was to make specific findings which cannot be supplied by a Court, the decision of the District Court below should be

reversed with directions to grant the declaratory and permanent injunctive relief prayed.

Respectfully submitted,

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APPENDIX

STATUTORY EXEMPTIONS TO THE FAIR LABOR STANDARDS ACT

I. Exempt under definition of "employee":

§ 3(e)(2)(A): Certain federal military, legislative and judicial employees;

§ 3(e)(2)(C): Certain state and local government elected or appointed officials.

II. Exempt under definition of "enterprise":

§ 3(s): Certain family operated enterprises.

III. Partially exempt from maximum hours (§ 7) provision:

§ 7(f): Certain employees working pursuant to a collectively bargained or individual contract;

§ 7(g): Certain employees working pursuant to certain types of agreements;

§ 7(i): Certain retail and service establishment employees;

§ 7(j): Certain hospital employees;

§ 7(k): Certain police and fire employees;

§ 7(m): Certain tobacco industry employees;

§ 7(n): Certain transit employees.

IV. Exempt from minimum wage (§ 6) and maximum hours (§ 7) provisions:

§ 13(a)(1): Certain executive, administrative and professional employees;

§ 13(a)(2): Certain laundry, cleaning, school and hospital employees;

§ 13(a)(3): Certain amusement and recreational establishment employees;

§ 13(a)(4): Certain other employees exempt under § 13(a)(2);

§ 13(a)(5): Certain fishermen;

§ 13(a)(6): Certain agricultural workers;

§ 13(a)(7): Certain employees exempted by order of the Secretary of Labor;

§ 13(a)(8): Certain newspaper employees;

§ 13(a)(10): Certain switchboard operators;

§ 13(a)(12): Any seaman serving on a non-American vessel;

§ 13(a)(15): Certain domestic employees.

V. Exempt from maximum hours (§ 7) provisions:

§ 13(b)(1): Certain employees subject to § 204 of the Motor Carrier Act of 1935;

§ 13(b)(2): Certain rail common carrier employees subject to Part I of the Interstate Commerce Act;

§ 13(b)(3): Any employee of an air carrier subject to Title II of the Railway Labor Act;

§ 13(b)(4): Certain employees handling perishable foods;

§ 13(b)(5): Outside buyers in the dairy industry;

§ 13(b)(6): Any seaman;

§ 13(b)(7): Certain transit employees;

§ 13(b)(8): Certain hotel and motel employees;

§ 13(b)(9): Certain radio and television announcers and other employees;

§ 13(b)(10)(A): Certain automobile, truck, and farm implement salesmen and other employees;

§ 13(b)(10)(B): Certain trailer, boat, and aircraft salesmen;

§ 13(b)(11): Certain deliverymen;

§ 13(b)(12): Certain agricluture and canal employees;

§ 13(b)(13): Certain livestock growers and sellers;

§ 13(b)(14): Certain country elevator employees;

§ 13(b)(15): Any maple sap processing employee;

§ 13(b)(16): Certain employees transporting fruits or vegetables;

§ 13(b)(17): Any taxicab driver employee;

§ 13(b)(18): Certain retail or catering service employees;

§ 13(b)(19): Certain bowling establishment employees;

§ 13(b)(20): Certain police and fire employees;

§ 13(b)(21): Certain domestic service employees;

§ 13(b)(22): Certain tobacco industry employees;

§ 13(b)(23): Certain employees handling telegraphic messages;

§ 13(b)(24): Certain foster parent employees;

§ 13(b)(25): Certain cotton ginning employees;

§ 13(b)(26): Certain sugar processing employees;

§ 13(b)(27): Any motion picture establishment employee;

§ 13(b)(28): Certain forestry employees.

VI. Exempt from minimum wage (§ 6), maximum hours (§ 7), inspection (§ 11) and child labor (§ 12) provisions:

§ 13(f): Employees whose services are performed outside the United States and its possessions.